Supreme Court, U. S.
FILED
APR 27 1978
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1977

No. 77-1273

BLANCHE HAWN, et al.,

Petitioners,

v.

COUNTY OF VENTURA, CALIFORNIA, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA SECOND APPELLATE DISTRICT

BRIEF FOR RESPONDENTS IN OPPOSITION

DOROTHY L. SCHECHTER
County Counsel
R. THOMAS HARRIS
Assistant County Counsel

Ventura County
Government Center
Ventura, Calif. 93009
(805) 654-2593

Attorneys for
Respondents

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1977

No. 77-1273

BLANCHE HAWN, et al.,

Petitioners,

v.

COUNTY OF VENTURA, CALIFORNIA, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA SECOND APPELLATE DISTRICT

BRIEF FOR RESPONDENTS IN OPPOSITION

DOROTHY L. SCHECHTER
County Counsel
R. THOMAS HARRIS
Assistant County Counsel

Ventura County
Government Center
Ventura, Calif. 93009
(805) 654-2593

Attorneys for
Respondents

SUBJECT INDEX

	Page
Table of Citations	iv
Opinion Below	1
Jurisdiction	2
Questions Presented	2
Constitutional and Statutory Provisions	3
STATEMENT OF THE CASE	4
REASONS FOR DENYING THE WRIT	9
I THE DECISION BELOW RESTS ON INDEPENDENT, ADEQUATE STATE CONSTITUTIONAL GROUNDS.	9
II THE DECISION BELOW IS SUPPORTABLE ON NUMEROUS OTHER NONFEDERAL GROUNDS.	11
A. The subject airport ordinance constitutes an unlawful exercise of the local initiative power under California law in that it seeks to impose additional airport siting requirements in a field which has been fully occupied by the state general law.	12

Page

B. The subject airport ordinance is invalid under California law in that it substantially impairs and interferes with the county's discharge of its governmental function of meeting the aviation needs of its citizens. 14

C. The subject airport ordinance is invalid under California law in that it delegates to cities a portion of the county's discretion to determine land uses in unincorporated areas. 15

III THE DECISION BELOW REGARDING THE UNCONSTITUTIONALITY OF THE AIRPORT ORDINANCE UNDER BOTH THE FEDERAL AND STATE CONSTITUTIONS WAS CLEARLY CORRECT. 18

A. Section 1 of the ordinance denies equal protection of the laws. 18

B. Section 2 of the ordinance cannot stand independently of Section 1. 23

IV THE DECISION BELOW IS OF LIMITED AND LOCAL EFFECT AND IS WITHOUT NATIONAL SIGNIFICANCE. 28

CONCLUSION 29

APPENDIX

Page

CALIF. CONST., Art. I, § 7 A-1

CALIF. CONST., Art. IV, § 16 A-1

CALIF. GOVERNMENT CODE, § 26020 A-1

TABLE OF CITATIONS

Page

Cases

Alexander v. Mitchell (1953) 119 Cal.App.2d 816, 260 P.2d 261 — 28

California Emp. Etc. Com. v. Payne (1947) 31 Cal.2d 210, 187 P.2d 702 — 25

California Water & Telephone Co. v. County of Los Angeles (1967) 253 Cal.App.2d 16, 61 Cal. Rptr. 618 — 14

Campen v. Greiner (1971) 15 Cal.App.3d 836, 93 Cal. Rptr. 525 — 28

Chase v. Kalber (1915) 28 Cal.App. 561, 153 P. 397 — 15

County of Riverside v. Whitlock (1972) 22 Cal.App.3d 863, 99 Cal.Rptr. 710 — 18

Curtis v. Board of Supervisors (1972) 7 Cal.3d 942, 104 Cal. Rptr. 297 — 18

Department of Mental Hygiene of Cal. v. Kirchner (1965) 380 U.S. 194 — 9, 10

Page

Dept. of Mental Hygiene v. Kirchner (1965) 62 Cal.2d 586, 43 Cal.Rptr. 329 — 10, 11

Enterprise Irrigation Dist. v. Farmers Mutual Canal Co. (1917) 243 U.S. 157 — 11

Fay v. Noia (1963) 372 U.S. 391 — 11

Fox Film Corp. v. Muller (1935) 296 U.S. 207 — 25

Geiger v. Board of Supervisors (1957) 48 Cal.2d 832, 313 P.2d 545 — 15

Hawn v. County of Ventura (1977) 73 Cal.App.3d 1009, 74 Cal.App.3d 582a, 141 Cal.Rptr. 111 — 1, 21

Herb v. Pitcairn (1945) 324 U.S. 117 — 11

Hunt v. Mayor & Council of Riverside (1948) 31 Cal.2d 613, 191 P.2d 426 — 15

Jankovich v. Indiana Toll Road Commission (1965) 379 U.S. 487 — 10, 11

Kramer v. Union Free School District (1969) 395 U.S. 621 — 18, 20

	Page
Lucas v. Forty-Fourth Gen. Assem. of Colo. (1964) 377 U.S. 713	23
Mervynne v. Acker (1961) 189 Cal.App.2d 558, 11 Cal. Rptr. 340	14
Mitchell v. Walker (1956) 140 Cal.App.2d 239, 295 P.2d 90	14, 28
Mueller v. Brown (1963) 221 Cal.App.2d 319, 34 Cal.Rptr. 474	14
O'Kane v. Catuira (1963) 212 Cal.App.2d 131, 27 Cal. Rptr. 818	27
Scott v. City of Indian Wells (1972) 6 Cal.3d 541, 99 Cal.Rptr. 745	20
Skyline Materials, Inc. v. City of Belmont (1961) 198 Cal.App. 2d 449, 18 Cal.Rptr. 95	25, 27
Weber v. City Council (1973) 9 Cal.3d 950, 109 Cal.Rptr. 553	18
Westbrook v. Mihaly (1970) 2 Cal.3d 765, 87 Cal.Rptr. 839, vacated on other grounds (1971) 403 U.S. 915	23
Whitney v. Municipal Court (1962) 58 Cal.2d 907, 27 Cal.Rptr. 16	14

Constitutions

	Page
California Constitution	
Article I, § 7	3, 8, 9, 23
Article I, § 11	3, 9
Article I, § 21	3, 9
Article IV, § 16	3, 8, 9, 23
Article XI, § 7	16

Statutes

California Government Code	
§ 26020	3, 13, 15
§ 26020(a)	24
§ 26020(c)	22
§ 26020(e)	22
California Public Utilities Code	
§§ 21001-21694 (State Aeronautics Act)	3, 13
§ 21002	13, 22
§ 21004	14

Page

§ 21662 13

§ 21666(e) 7, 13

United States Code

Title 28

§ 1257(3) 2

Ordinances

Ventura County Airport Initiative Ordinance No. 1 2, 5, 8, 18

§ 1 3, 15, 18, 19, 21, 22, 23, 24, 25, 26, 27, 28

§ 2 3, 15, 16, 23, 24, 25, 26, 27, 28

Page

Texts

CALIFORNIA ZONING PRACTICE (Calif. Cont. Ed. Bar 1969)

§ 4.33 16

THE LAW OF POLITICS (Calif. Cont. Ed. Bar 1977) 12

§ 5.8 14

§ 5.10 14

§ 5.16 14

5 Witkin, SUMMARY OF CAL. LAW (8th ed. 1974) Constitutional Law, § 87 14

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-1273

BLANCHE HAWN, et al.,

Petitioners,

v.

COUNTY OF VENTURA, CALIFORNIA, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA SECOND APPELLATE DISTRICT

BRIEF FOR RESPONDENTS IN OPPOSITION

Opinion Below

The opinion of the California Court of Appeal (App. 1-28 of Petition) is reported as Hawn v. County of Ventura (1977) 73 Cal. App.3d 1009 and 74 Cal. App.3d 582a, 141 Cal.Rptr. 111.

Jurisdiction

Petitioners have requested review by this Court pursuant to 28 U.S.C. § 1257(3).

Questions Presented

1. Was Ventura County Airport Initiative Ordinance No. 1 held to be invalid under provisions of the California Constitution?

2. Is Ventura County Airport Initiative Ordinance No. 1 invalid under the California Constitution, California statutes and California case law?

3. Assuming that Ventura County Airport Initiative Ordinance No. 1 is valid under California's Constitution, statutes and case law (and, therefore, that a federal question could be reached), does the ordinance nonetheless violate the equal protection requirement of the federal Constitution?

4. Are sections 1 and 2 of Ventura County Airport Initiative Ordinance No. 1 severable (and is severability a federal question)?

Constitutional and Statutory Provisions

In addition to the constitutional and statutory provisions set forth in the Petition (Pet. App. 30-33), the following California constitutional and statutory provisions are involved in this case, and are (with the exception of the prohibitively lengthy State Aeronautics Act) reproduced in full in the Appendix attached hereto:

California Constitution,
Article I, § 7 (previously in Article I, § 21)
California Constitution,
Article IV, § 16 (previously in Article I, § 11)
California Government Code,
§ 26020
California Public Utilities Code
§§ 21001-21694 (State Aeronautics Act)

STATEMENT OF THE CASE

The summary of facts contained in the opinion of the Court of Appeal (Pet. App. 7-12) substantially parallels the trial court's findings of facts and indicates the background against which the legal issues were presented below. As the opinion indicates, this litigation concerns the Oxnard Air Force Base which has been in operation in Ventura County for approximately 40 years, and which has previously been operated as a public airport between periods of federal military use.

The base, which is now being operated by Ventura County as a public airport, straddles the boundary line of the City of Camarillo and is surrounded for some distance on all sides by sparsely populated agricultural lands. In addition to use of the site for aviation purposes, Ventura County has leased buildings on the property to various school districts for use for educational purposes.

The three individual petitioners herein have constantly opposed operation of the Oxnard Air Force Base as a public airport despite its undeniable geographic and environmental suitability to meet the pressing needs for air service in Ventura County and the prohibitive costs of developing any alternate location. (See Pet. App. 10-12) Seeking to employ Ventura County Airport Initiative Ordinance No. 1 as a mechanism for realizing their desire to prohibit airport operations, petitioners initiated this lawsuit to enjoin the County of Ventura from using the airport facility until such time as the use is approved by a majority of the electors residing within the City of Camarillo and to obtain a judicial declaration as to the validity of the ordinance.

The trial court determined that the subject ordinance was invalid because of conflicts with numerous California statutes and judicial decisions (see Pet. App. 13-14) in addition to its unconstitutional denial of equal protection of the laws. The California Court of Appeal affirmed (Pet.

App. 1-28), and petitioners' subsequent request for a hearing in the California Supreme Court was denied. (Pet. App. 29)

Initially, the City of Camarillo was aligned with the three individual petitioners herein as plaintiffs in this action. However, in a city election held while this case was pending before the Court of Appeal, the residents of the City of Camarillo elected a majority of pro-airport candidates to the City Council and the city subsequently abandoned its appeal. (Pet. App. 3, fn. 1)

In their "Statement of the Case" herein, petitioners have asserted that Ventura County's decision to operate the subject airport "was wholly arbitrary" and that "no planning or site selection whatever took place." (Pet. 12, fn. 6) However, the facts, as ascertained by the courts below, show that studies were conducted which confirmed the existence of an unmet need for air service in Ventura County and that operation of the Oxnard Air Force Base represents the

"only present, feasible alternative" to meet existing airport requirements. (Pet. App. 11) Regarding any alleged lack of "planning," petitioners have already conceded in their Opening Brief (p. 5, fn. 5) below that Ventura County "has obtained a state airport permit" for the Oxnard Air Force Base. This permit issued only after public hearings were held to evaluate environmental considerations and the California Department of Transportation was able to determine therefrom that the "advantages to the public" of the airport operation outweighed any "disadvantages to the environment." California Public Utilities Code § 21666(e).

In their attempt to enlist the attention of this Court, petitioners have also made the curious (and unsupportable) assertion in their "Statement of the Case" that the California Court of Appeal "based its decision on federal equal protection grounds alone" (emphasis added) and, thus, that "the federal constitutional issue . . . forms the sole basis of

the decision below." (Pet. 8--emphasis added) Despite petitioners' understandable desire to deny the existence of any independent state ground for the judgment below in order to invoke this Court's review, such representations regarding the basis of the decision below are flatly contradicted in the opinion of the Court of Appeal. After noting in its opinion that the trial court had found the subject ordinance invalid on the grounds, inter alia, "that it violated the equal protection clause of the Fourteenth Amendment to the United States Constitution, as well as article I, section 7 and article IV, section 16, of the California Constitution" (Pet. App. 12--emphasis added), the Court of Appeal specifically expressed its concurrence as follows:

> "We conclude . . . that Ventura County Airport Initiative Ordinance No. 1 contains a voting scheme which violates the equal protection clause of both the federal and state Constitutions . . . ." (Pet. App. 17--emphasis added)

REASONS FOR DENYING THE WRIT

I

THE DECISION BELOW RESTS ON INDEPENDENT, ADEQUATE STATE CONSTITUTIONAL GROUNDS.

Petitioners are clearly in error in asserting that the decision below rests "on federal equal protection grounds alone" (Pet. 8), for both the trial and appellate courts expressly concluded that the subject airport ordinance violates the equal protection provisions of the California Constitution. (Pet. App. 12 and 17) Such provisions (Cal. Const., Article I, § 7 and Article IV, § 16--previously in Article I, § 21 and Article 1, § 11, respectively) are, as previously recognized by this Court, the California equivalent of the federal equal protection clause. Department of Mental Hygiene of Cal. v. Kirchner (1965) 380 U.S. 194, 196, fn. 1. As noted by the California Supreme Court, the federal equal protection clause and the California equal protection provisions "provide generally equivalent but indepen-

dent protections in their respective jurisdictions." (Emphasis added.) Dept. of Mental Hygiene v. Kirchner (1965) 62 Cal.2d 586, 588, 43 Cal.Rptr. 329, 330.

The opinion of the Court of Appeal expressly stated that the subject airport ordinance was found to be unconstitutional under "both" the federal and state constitutions (Pet. 17).[1/] Past cases have made clear that jurisdiction to review would exist "only if the federal ground had been the sole basis for the decision" (emphasis in original) Dept. of Mental Hygiene of Cal. v. Kirchner (1965) 380 U.S. 194, 198, and that in cases where the same conclusion as to unequal protection could be reached under either the federal or state constitution, the

1/ "In such circumstances, even though a state court's opinion relies on similar provisions in both the State and Federal Constitutions, the state constitutional provision has been held to provide an independent and adequate ground of decision depriving this Court of jurisdiction to review the state judgment. [Citations]" Jankovich v. Indiana Toll Road Commission (1965) 379 U.S. 487, 491-492.

California equal protection provisions independently compel the state court's decision. Dept. of Mental Hygiene v. Kirchner (1965) 62 Cal.2d 586, 588, 43 Cal.Rptr. 329, 330.

Inasmuch as the decision below rests upon an independent, adequate state constitutional ground, it is respectfully submitted that long-settled principles governing review by this Court[2/] call for denial of the petition for certiorari herein.

II

THE DECISION BELOW IS SUPPORTABLE ON NUMEROUS OTHER NON-FEDERAL GROUNDS.

As noted by the Court of Appeal (at Pet. App. 12-14), the trial court

2/ See Jankovich v. Indiana Toll Road Commission (1965) 379 U.S. 487, Fay v. Noia (1963) 372 U.S. 391, Herb v. Pitcairn (1945) 324 U.S. 117, Enterprise Irrigation Dist. v. Farmers Mutual Canal Co. (1917) 243 U.S. 157.

found the airport initiative[3] ordinance to be invalid not just on constitutional grounds, but also in light of conflicts with California's statutory law and judicial precedents. The decision below is clearly supportable on such other non-federal grounds:

A. The subject airport ordinance constitutes an unlawful exercise of the local initiative power under California law in that it seeks to impose additional airport siting requirements in a field which has been fully occupied by the state general law.

As concluded by the trial court, the California State Legislature has preempted and wholly occupies the law of the state in respect to the location and establishment of county airports through its passage of the State Aeronautics Act (California

3/ For an overview of California law regarding initiative and referendum measures, see Chapter 5 ("California Law on Initiative and Referendum") in THE LAW OF POLITICS (Calif. Cont. Ed. Bar 1977), pp. 321-368.

Public Utilities Code §§ 21001 et seq.)[4] and other measures, and has specifically delegated to each county board of supervisors (as an agent for local implementation of state purposes) the authority to "provide and maintain public airports . . . either within or without the incorporated territory of municipalities." (California Government Code § 26020) Under California law, matters of statewide concern on which particular powers have been exclusively delegated by the State Legislature to the local legisla-

4/ In this Act, the California Legislature has set forth hundreds of provisions regulating all aspects of aeronautics (including airport site selection, approval for which must be obtained from the California Department of Transportation--§ 21662) for the purposes, inter alia, of promoting the development of a "statewide system of airports" and "effecting uniformity of the laws and regulations relating to aeronautics." § 21002. Significantly, the Act provides that it is the state which has the responsibility of determining the environmental suitability of proposed airport sites (§ 21666(e))--a responsibility which the subject local ordinance proposes to transfer to the voters of the City of Camarillo.

tive body cannot be subjected to local initiative and referendum measures.5/

B. The subject airport ordinance is invalid under California law in that it substantially impairs and interferes with the county's discharge of its governmental function of meeting the aviation needs of its citizens.

Under California law, the operation of a public airport is recognized to be a "public and governmental function . . . exercised for a public purpose" as a matter of "public necessity." California Public Utilities Code § 21004. Interference with the discharge of this important governmental function by local initiative and referendum measures is not permitted.

5/ 5 Witkin, SUMMARY OF CAL. LAW (8th ed. 1974) Constitutional Law, § 87, p. 3322; THE LAW OF POLITICS (Calif. Cont. Ed. Bar 1977), §§ 5.8, 5.10 and 5.16. Also see Whitney v. Municipal Court (1962) 58 Cal.2d 907, 909, 27 Cal.Rptr. 16, 17-18, Mueller v. Brown (1963) 221 Cal.App.2d 319, 327, 34 Cal.Rptr. 474, 478, Mitchell v. Walker (1956) 140 Cal.App. 2d 239, 244, 295 P.2d 90, 93, California Water & Telephone Co. v. County of Los Angeles (1967) 253 Cal.App.2d 16, 61 Cal.Rptr. 618, Mervynne v. Acker (1961) 189 Cal.App.2d 558, 11 Cal.Rptr. 340.

See Geiger v. Board of Supervisors (1957) 48 Cal.2d 832, 839-840, 313 P.2d 545, 549, Hunt v. Mayor & Council of Riverside (1948) 31 Cal.2d 618, 628-629, 191 P.2d 426, 431-432, Chase v. Kalber (1915) 28 Cal.App. 561, 569-570, 153 P. 397, 400.

C. The subject airport ordinance is invalid under California law in that it delegates to cities a portion of the county's discretion to determine land uses in unincorporated areas.

Section 1 of the subject airport ordinance unquestionably prohibits the County of Ventura from establishing airports within incorporated areas absent a prior favorable vote of city electors and, thus, has the effect of delegating to city electors powers of decision which have been assigned specifically to the county board of supervisors by the State Legislature in California Government Code § 26020. Section 2 of the ordinance contains a more subtle, but equally effective, delegation of the county board's powers to the cities in its prohibition of the establishment of county airports

even in unincorporated territory "if any portion of any runway of such airport is within one and one-half (1 1/2) miles of any property limited by the applicable zoning ordinance for such property to residential uses." (Pet. App. 32--emphasis added)

The zoning which is "applicable" within city boundaries is, of course, city zoning. The county board of supervisors has no ability to zone city lands and the city has no power to zone county lands under California Constitution, Article XI, § 7.[6/] (Pet. App. 30) Yet, by virtue of section 2, the subject airport ordinance allows cities to impose a "nonairport" zone extending at least one and one-half miles into unincorporated territory merely by zoning property at the edges of their municipal boundaries as "residential." In effect,

6/ In addition to the lack of constitutional authority for California cities to zone outside their boundaries, "there is no statutory power to zone extraterritorially." CALIFORNIA ZONING PRACTICE (Calif. Cont. Ed. Bar 1969), § 4.33, p. 124.

therefore, the ordinance delegates to cities a portion of the county's power to zone county territory, allowing cities to zone extraterritorially in contravention of the California Constitution.

As evidenced by this brief review, the subject airport ordinance is demonstrably invalid on numerous nonfederal grounds. In light of its recognition of the ordinance's equal protection infirmities under both the federal and state Constitutions, the Court of Appeal found it unnecessary to consider these other nonfederal issues. (Pet. App. 26) However, the presence of such other meritorious arguments shows that the decision below was correct without regard for the alleged federal question sought to be raised by the petition herein. As a result, no federal question need even be reached in order to sustain the decision below.

III

THE DECISION BELOW REGARDING THE UNCONSTITUTIONALITY OF THE AIRPORT ORDINANCE UNDER BOTH THE FEDERAL AND STATE CONSTITUTIONS WAS CLEARLY CORRECT.

A. Section 1 of the ordinance denies equal protection of the laws.

For equal protection purposes, under both the California and federal Constitutions, the voting scheme established by Ventura County Airport Intiative Ordinance No. 1 is clearly invalid. This conclusion holds true whether the ordinance is evaluated under either the liberal "rational relationship" test or the strict "compelling interest" test which is normally applied by both state and federal courts to classifications involving voting rights.7/

7/ See Kramer v. Union Free School District (1969) 395 U.S. 621, 627-628, Weber v. City Council (1973) 9 Cal. 3d 950, 960, 109 Cal.Rptr. 553, 559, Curtis v. Board of Supervisors (1972) 7 Cal.3d 942, 951-952, 104 Cal.Rptr. 297, 303-304, County of Riverside v. Whitlock (1972) 22 Cal.App.3d 863, 871, 99 Cal.Rtpr. 710, 715.

Regarding section 1's denial of equal protection, it should be noted that the subject airport ordinance is apparently designed to deal only with the impacts of aircraft landing and taking off over nearby residences.8/ Yet, rather than purporting to require a vote of all those residing within a given distance of a proposed runway location, section 1 distributes the franchise in such matters only to those who happen to reside within invisible municipal boundaries. How, if the impact of overflights is the problem sought to be solved by enfranchisement of those affected, can it ever be "rational" (much less "compelling") to poll only those who happen to reside

8/ Note, for example, that the ordinance defines "airport" so as to require an election only upon the location of runways within specified distances and not upon the location of passenger terminals, parking lots, hangars and other accessory facilities. (Pet. App. 32)

within corporate limits?[9/]

Even assuming, arguendo, that it is proper to enact a proposal authorizing balloting on airport locations only by those citizens "primarily affected" by aircraft overflights, it is clear that section 1's scheme does not satisfy the "exacting standard of precision" required of "statutes which selectively distribute the franchise." Kramer v. Union Free School District (1969) 395 U.S. 621, 632. As noted in the Kramer case,

> "Whether classifications allegedly limiting the franchise to those resident citizens 'primarily interested' deny those excluded equal protection of the laws depends, inter alia, on whether all those excluded are in fact substantially less interested or affected than those the statute includes." (Emphasis added.) Id.

9/ As the California Supreme Court has recognized, "municipal boundary lines rarely indicate where urban development ceases" and care should be taken not to "make a fetish out of invisible municipal boundary lines." Scott v. City of Indian Wells (1972) 6 Cal.3d 541, 548, 99 Cal.Rptr. 745, 749.

By purporting to enfranchise all those who live within the City of Camarillo, regardless of how far away from the Oxnard Air Force Base they may actually reside, while denying the vote to all residents of unincorporated areas, regardless of how near the Oxnard Air Force Base they may reside, [10/] section 1 presents a classic example of the sort of irrational and imprecise distribution of the franchise condemned in Kramer. To wit, its classifications "permit inclusion of many persons who have, at best, a remote and indirect interest . . . [in the subject of the election] and, on the other hand, exclude others who have a distinct and direct interest . . . [in such subject]." Id.

Obviously, if the purpose of section 1 is to enfranchise those persons who are

10/ In this regard, it should be noted that private intervenors/respondents Johnson and Richardson reside outside of the City of Camarillo, but "in the immediate vicinity of the City of Camarillo and the Oxnard Air Force Base" (emphasis added, 74 Cal.App.3d at 1018, fn. 2, 141 Cal.Rptr. at 116, fn. 2)--a point omitted from petitioners' reproduction of the text of the decision below (see Pet. App. 18, fn. 2).

directly affected by the arrival and departure of aircraft (as would appear to be the case judging from the ordinance's definition of "airport"), city boundaries provide no rational line of demarcation. Nor is there any other logical justification for the voting distinctions drawn by section 1. To assert that this section does not violate both state and federal requirements of equal protection by including only city residents and excluding all county residents regardless of their proximity to the airport is to ignore the fact that neither the benefits nor the burdens of airport operations fall exclusively on city residents. As legislatively declared in California, there is a statewide "public interest" in the benefits derived from air transportation. California Public Utilities Code § 21002. And the burdens of airport operation, both environmental and monetary (California Government Code § 26020(c) and (e)), fall both within and outside of incorporated areas. Such benefits and burdens recognize no city boundaries.11/

11/ Nor can the equal protection infirmities of section 1's voting scheme be ex-

B. Section 2 of the ordinance cannot stand independently of Section 1.

Having correctly determined that section 1 of the subject airport ordinance violates the equal protection clauses of both the federal Constitution and the California Constitution (Article I, § 7 and Article IV, § 16), the Court of Appeal went on to hold that

> "section 2 of the ordinance cannot be sustained by itself. Section 2 makes reference to section 1 as being an exception to section 2. Section 2, therefore, is so intertwined with section 1 that if

11/ (continued)
cused by the fact that the subject ordinance was adopted as an initiative measure. Whether viewed under federal or state precedents, "[a] citizen's constitutional rights can hardly be infringed simply because a majority of the people choose that it be." Lucas v. Forty-Fourth Gen. Assem. of Colo. (1964) 377 U.S. 713, 736-737. Also see Westbrook v. Mihaly (1970) 2 Cal.3d 765, 796, 87 Cal.Rptr. 839, 861, vacated on other grounds (1971) 403 U.S. 915.

section 1 falls, section 2 must also fall." (Pet. App. 27)12/

Petitioners have argued at length that this holding is incorrect, pointing out that the ordinance contains a broad severability clause. (Pet. 28-30) However, completely aside from the fact that severability issues do not constitute

12/ In addition to holding that section 2 cannot stand in the absence of section 1 to which it refers as an exception, the Court of Appeal also commented on the impropriety of giving section 2 partial effect so as to flatly prohibit airports on unincorporated lands near residential zones but not on incorporated lands near residential zones. (Pet. App. 27) The petitioners herein criticize this additional basis for the court's ruling at length on the apparent assumption that section 2 is a county land use ordinance and that the county cannot zone city lands. However, the Court of Appeal did not say that it was treating section 2 as a county zoning ordinance; it merely recognized that, in the exercise of its statutory power to locate airports "either within or without the incorporated territory of muncipalities" (California Government Code § 26020(a)), the county may not preferentially protect residentially zoned areas near unincorporated airport sites to the detriment of residentially zoned areas near incorporated airport sites without some rational justifi-

federal questions,13/ such arguments ignore settled California principles regarding application of severability clauses. Under California law, a severability clause is not to be treated as an "inexorable command" to sever (Skyline Materials, Inc. v. City of Belmont (1961) 198 Cal.App.2d 449, 459, 18 Cal.Rptr. 95, 100) and "does not deprive the judiciary of its normal power and duty to construe the statute and determine whether the unconstitional part so materially affects the balance as to render the entire enactment void." California Emp. Etc. Com. v. Payne (1947) 31 Cal.2d 210, 214, 187 P.2d 702, 704.

12/ (continued)
cation for making a distinction between such incorporated and unincorporated residential areas. Moreover, petitioners' dissatisfaction with the appellate court's discussion of this secondary basis for invalidating section 2 does not change the validity of the Court's primary and independent holding that section 2 is too intermeshed with section 1 to stand alone.

13/ See Fox Film Corp. v. Muller (1935) 296 U.S. 207, 210.

To enforce section 2 while ignoring its reference to the voting exception of section 1 would have the effect, inter alia, of automatically prohibiting airport operations on unincorporated lands nearby, and on unincorporated islands within, cities if there is any residentially zoned city land within a one and one-half mile radius of the airport[14/] without regard to whether the city residents might wish to have such airport facilities. Obviously, the thought that its reference to the section 1 exception would

---

14/ It should be noted that section 2 does not speak simply of banning airports on unincorporated sites within one and one-half miles of "county residential areas" as petitioners assert (Pet. 3 (fn. 2), 15 and 25), but within one and one-half miles of "any property limited by the applicable zoning ordinance for such property to residential uses." (Pet. App. 32--emphasis added) Thus, section 2 is applicable to unincorporated airport sites within one and one-half miles of any land which the "applicable" zoning ordinance (be it city or county) has limited to residential uses, and would prohibit airport operations on county lands both outside of and within city limits (i.e., on unincorporated islands) if there is any land within a one and one-half mile radius of the airport which has been zoned residential.

have allowed city voters to authorize such an airport may well have been a major inducement to the voters' approval of section 2. To speculate in such a situation that the voters might have enacted section 2 even without its reference to the saving provisions of section 1 would be to assume that which cannot be known, and would fly in the face of settled principles of state law regarding the application of severability clauses:

> "[T]he general rule is that only the invalid portion of a legislative enactment should be stricken down, and the valid balance enforced . . . . Of course, where this procedure would amount to usurpation of the legislative power, as where the exception may well have been a major inducement to adoption of the legislation, the entire act must fall [citation]." (Emphasis added.) Skyline Materials, Inc. v. City of Belmont (1961) 198 Cal.App.2d 449, 459, 18 Cal. Rptr. 95, 100. (Also see O'Kane v. Catuira (1963) 212 Cal.App.2d 131, 141, 27 Cal.Rptr. 818, 824.)

By its specific reference to the voting provisions of section 1 as an exception to its own prohibitions,

section 2 becomes inextricably intertwined with section 1 and must fall with it.[15/]

IV

THE DECISION BELOW IS OF LIMITED AND LOCAL EFFECT AND IS WITHOUT NATIONAL SIGNIFICANCE.

This case involves the validity of but a single, unique county ordinance under one state's particular constitutional provisions, statutes and judicial precedents. No issues of national interest or significance are presented; in fact, petitioners have been completely unable to suggest any impacts of national importance warranting consumption of this Court's time by review on certiorari.

15/ The fact that the airport ordinance was enacted as an initiative measure does not cause any suspension of the rules governing the application of severability clauses under California law. See Campen v. Greiner (1971) 15 Cal.App.3d 836, 843-844, 93 Cal.Rptr. 525, 529, Mitchell v. Walker (1956) 140 Cal.App.2d 239, 244, 295 P.2d 90, 93, Alexander v. Mitchell (1953) 119 Cal.App.2d 816, 829-830, 260 P.2d 261, 268-269.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

DOROTHY L. SCHECHTER
County Counsel
County of Ventura

R. THOMAS HARRIS
Assistant County Counsel
County of Ventura

Attorneys for Respondents

APPENDIX

CALIFORNIA CONSTITUTION

Article I, § 7

"(a) A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws.

(b) A citizen or class of citizens may not be granted privileges or immunities not granted on the same terms to all citizens. Privileges or immunities granted by the Legislature may be altered or revoked."

CALIFORNIA CONSTITUTION

Article IV, § 16

"(a) All laws of a general nature have uniform operation.

(b) A local or special statute is invalid in any case if a general statute can be made applicable."

CALIFORNIA GOVERNMENT CODE

§ 26020

"As a necessary adjunct to aerial transportation and the use of aerial high-

ways, the board of supervisors may provide and maintain public airports and landing places for aerial traffic for the use of the public. For such purposes the board of supervisors may:

(a) Acquire by purchase, condemnation, donation, lease, or otherwise real or personal property, either within or without the incorporated territory of municipalities, necessary for such purposes, and improve, construct, reconstruct, lease, furnish, refurnish, use, repair, maintain, and control the property, including buildings, structures, and lighting and other equipment and facilities necessary for such use.

(b) Provide all necessary custodians, employees, attendants, and supplies for the proper maintenance of the property for the purposes specified in this section.

(c) In addition to all other taxes, levy in any year a special tax not to exceed three mills ($0.003) on the one dollar ($1) of assessed valuation on all taxable property in the county, the proceeds of which may be accumulated for not to exceed five years for use in carrying out the purposes of this section. A county board of supervisors shall not levy an airport tax as provided for by this section on any airport district formed pursuant to the 'California Airport District Act' (Part 2 (commencing with Section 22001) of Division 9 of the Public Utilities Code).

(d) Establish a fund or funds for such purposes and appropriate and transfer from the general fund to such fund or funds from time to time such money as it deems necessary.

(e) In the manner provided by law, incur a bonded indebtedness on behalf of the county."